

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Winstar Communications, LLC)	
Emergency Petition for Declaratory Ruling)	WC Docket No. 02-80
Regarding ILEC Obligations to)	
Continue Providing Services)	

COMMENTS OF SBC COMMUNICATIONS INC.

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SBC Communications Inc., on behalf of itself and its affiliates (collectively, the “SBC Affiliates”)¹, by and through their undersigned counsel, file these comments to the Emergency Petition (the “Petition”) for Declaratory Ruling filed by Winstar Communications, LLC (“IDT Winstar”). For the reasons set forth below, the Emergency Petition should be DENIED.

I. INTRODUCTION

IDT Winstar filed this Petition to address a self-created and pre-planned “emergency.” In recent hearings before the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) IDT’s counsel announced to the Court that, at the time IDT Winstar entered into the agreement to acquire the assets of Winstar Communications, Inc. and its affiliates (the “Debtors”), IDT Winstar had no intention of assuming agreements with incumbent local exchange carriers (“ILECs”) pursuant to which the ILECs were providing services and circuits used by the Debtors to serve their end user customers. It is equally apparent that, when it acquired the assets of the Debtors, IDT Winstar had no intention of sending out notices, or permitting the Debtors to send out the notices, that would fulfill the Debtors’ obligations under

¹ Although IDT Winstar primarily directs the Emergency Petition to Verizon and Quest, it seeks a ruling affecting “any similarly situated incumbent carrier” and specifically names SBC. Petition n. 1.

Section 214 of the Federal Communications Act (the “Communications Act”) to notify Debtors’ end user customers that IDT Winstar would terminate service if it chose not to assume such agreements. Either course of action (or a combination of both) would have ensured a seamless transition of customers to IDT Winstar or other local exchange carriers. Instead, in what can only be characterized as a tactical maneuver meant to deprive the ILECs of their rights under the United States Bankruptcy Code, IDT Winstar embarked upon a course of conduct designed to place in jeopardy the uninterrupted provision of telecommunications services to the very customers it now professes to seek to protect.

The Petition does not seek to enforce the requirements of the Communications Act or the Commission’s Rules, rather it seeks preferential treatment for IDT Winstar and invites the Commission to ignore both the bankruptcy law and the interconnection agreements and tariffs pursuant to which the ILECs provisioned circuits to the Debtors, and which were approved by the Commission and various state commissions. IDT Winstar has within its own power the ability to rectify this situation and avoid potential disruption of services to customers: it can pay for what it wants. By filing the Petition, IDT Winstar seeks to inject the Commission into the middle of a dispute regarding the ILECs’ rights and IDT Winstar’s duties under the Bankruptcy law, and, through Sophistry regarding the Commission’s rules, get the Commission to subvert the ILECs’ rights in Bankruptcy or under their tariffs and agreements. The Commission should see the Petition for what it is, and reject IDT Winstar’s ploy.

II. BACKGROUND

A. The Bankruptcy Proceedings

The Debtors filed their bankruptcy petitions on or about April 18, 2001. In December, 2001, the Debtors came to the conclusion that they would not be able to reorganize, and, in a

hearing on December 17, 2001, Debtors announced that they would seek to convert their cases to liquidation cases under chapter 7 of the Bankruptcy Code on the following day.² Miraculously, during the very hearing in which the Debtors were making this announcement, IDT Winstar finally made an offer that the Debtors, faced with a conversion and liquidation of their cases, were forced to accept.³ As even Howard Jonas, IDT's chairman, recognized, their offer, which amounted to between \$30 million and \$42 million, left the Debtors' creditors holding \$6 billion in debt.⁴

Among the Debtors' creditors are the SBC Affiliates. The SBC Affiliates are owed (i) in excess of \$10.3 million for services rendered to the Debtors pre-bankruptcy; (ii) in excess of \$1.7 million for services rendered to the Debtors from the date of the bankruptcy through December 18, 2001; and (iii) \$2,173,189.89 for services rendered to the Debtors (for the benefit of IDT Winstar) for the bills rendered for the period from December 19, 2001 through mid-April, 2002.⁵ Debt related to services provided to Winstar continues to accrue at a rate of \$525,000 per week.

² Winstar Communications Inc., Case No. 01-1430 (JJF), Transcript December 17, 2001 (attached as Exhibit A).

³ IDT Winstar had been having "on - and - off discussions" with Debtors during the entire auction process, but did not make an offer until the case was on the verge of being converted. December 17, 2001 Transcript at 18.

⁴ IDT Winstar admits that, in essence, it stole the company from the Debtors' creditors. "This is an incredible deal. It might not top the Dutch settlers buying the Island of Manhattan for twenty four dollars, but it comes pretty close," said IDT Chairman Howard Jonas. "With almost \$5 billion in assets and about \$200 million in annual revenue, Winstar has great potential. And I have a plan to make it a very profitable venture." IDT Press Release: IDT Corp. Announces the Acquisition of Winstar Communications, Inc., Newark, NJ – December 20, 2001.

⁵ Only in the face of having to appear before the Commission and the United States District Court for the District of Delaware has IDT Winstar recently offered to place the \$2,173,189.89 in a third party escrow pending resolution of "disputes." To date, IDT Winstar has submitted disputes totaling \$23,987.09.

The Bankruptcy Court conducted a sale hearing as part of the sale process. As explained to the Court at that hearing, and subsequently embodied in various agreements, IDT Winstar was given a period of 120 days to determine whether to assume or reject contracts to which the Debtors were a party, including the interconnection agreements and other agreements between the Debtors and the SBC Affiliates. In the meantime, absent rejection, and subject to prepayment, the SBC Affiliates were required to continue to provide services to Winstar under the various agreements to which they were a party.⁶ In the event that IDT Winstar directed Winstar to reject any interconnection agreement or other agreement with the SBC Affiliates: “(i) no termination liabilities shall arise; (ii) [SBC] shall provide telecommunications services in accordance with, and to the extent required by, applicable law in a non-discriminatory manner; and (iii) [SBC] will charge [IDT Winstar] for replacement circuits the lower of actual costs and tariff rates to set up or establish such replacement circuits.”⁷

The law firm of McDermott Will & Emery represented IDT Winstar at the sale hearing. During the hearing, Mr. Jonas testified on behalf of IDT Winstar, and Mr. Albalah, a partner at McDermott Will & Emery, made representations to the Court on behalf of his client in an attempt to have the sale approved by the Court. As relevant here, both Mr. Jonas and Mr. Albalah represented to the Court that IDT Winstar would be making decisions about whether to assume or reject SBC’s interconnection agreements and other agreements, and further

⁶ A “Service Provider” could terminate services on three days’ notice of an uncured default in such prepayment. Order Authorizing (i) Sale of Certain of the Debtors’ Assets Free and Clear of Liens, Claims Encumbrances, and Interests, (ii) Approving Cure Amounts with respect to Certain Executory Contracts and Unexpired leases, (iii) Authorizing the Debtors to Enter Into and Approving Management Agreement, (iv) Approving Regulatory Transition Process and (v) Granting Related Relief (the “Sale Order”) ¶ 23(c) (attached as Exhibit B).

⁷ Sale Order ¶ 23(f) (emphasis added).

acknowledged that IDT Winstar would be liable to pay, and represented that it would pay, the cure amounts in any markets in which it decided to maintain existing circuits and continue to provide services.⁸

Subsequent to the sale, the Debtors' bankruptcy cases were converted to cases under chapter 7 (liquidation) of the Bankruptcy Code. Christine Shubert, Esquire was appointed as the

⁸ Mr. Jonas represented to the Court as follows:

"The more likely scenario is SBC does business in let's say 20 states, you know, with Ameritech. So we may decide we're going to keep Chicago and Dallas, and we may decide we're not going to keep San Antonio.

So then we say, okay, we reject San Antonio. We don't think that we should be charged a disconnect charge on San Antonio because we have the right to disconnect the contract. The fact that they have a monopoly that goes over 20 states isn't our fault. That they were just one company and we rejected, *now we understand if we accept Dallas and there's a past due on Dallas, we have to cure the past due in order to keep, you know, the contract past 120 days or whatever.*"

Winstar Communications Inc., Case No. 01-1430 (JJF), Transcript December 18, 2001 (attached as Exhibit C) (emphasis added) p. 249. And again, Mr. Jonas represented:

"[i]f we decide that we want to keep the lines from New York to Boston or we want to keep the lines from Boston to Dallas, okay, after a certain period of time, we have to cure what we owe on that line. But if we decide we don't want to keep the line going from Cleveland to, you know, Iowa, we shouldn't be charged a termination charges.

It's just a contract that we are rejecting. It's just a contract that we're deciding not to keep, and that's the spirit of the agreement.

December 18, 2001 Transcript p. 252 (emphasis added). And, Mr. Albalah represented to the Court as follows:

"We are going to go in and say yes, yes, yes, no, no, no. *When we say yes, we'll cure it and we'll assume any termination liability is going forward. It's typical cure. I think everyone understand that it's not controversial.* We're going to groom, say reject, reject, reject. From closing to rejection, we'll pay nothing else."

Id. p. 246 (emphasis added).

chapter 7 trustee for the Debtors' estates. On March 18, 2002, Ms. Shubert filed a motion seeking to extend the time in which she had to bring motions to assume or reject executory contracts (the "Extension Motion"). Recognizing the critical nature of this motion to the ability of IDT Winstar to receive services from the SBC Affiliates and other ILECs, IDT Winstar joined in the Extension Motion. The SBC Affiliates objected to the Extension Motion.

The Court held a hearing on the Extension Motion on April 11, 2002. In addition to counsel, IDT Winstar had at least the following representatives at the hearing: (i) Mr. Jonas, (ii) Mr. James Courter, IDT's chief executive officer and vice chairman; (iii) Mr. Geoffrey Rochwarger, the chief operating officer of IDT Winstar, and (iv) Mr. Brian Finkelstein, the chief executive officer of IDT Winstar. During Ms. Shubert's testimony, her attorney asked for a continuance of the hearing in order to give him more time to consider the position of the various parties. The Court granted a continuance until April 15, 2002, but indicated that it expected the Trustee to be able to tell the Court at the continued hearing which contracts she wanted the extension for.⁹ The Court also indicated that it would not extend the time with respect to the contracts that had been subject to the sale to IDT Winstar.

At the continued hearing on April 15, 2002, IDT Winstar indicated that it did not need any more time to decide whether to assume or reject any interconnection or other agreements with any ILEC; it was instructing the chapter 7 trustee to reject all such agreements. IDT Winstar then made the most candid statement it yet had made to the Bankruptcy Court. In direct contradiction of its representations to the Bankruptcy Court at the December 18, 2001 sale hearing, IDT Winstar, through its counsel, Mr. Albalah, stated "it was never contemplated to

⁹ Certain stock and foreign businesses or interests in joint ventures were not sold as part of the sale to IDT Winstar.

assume these [interconnection agreements]. There's no reason to assume these agreements, because we're entitled to the services as a matter of Telecom Law.”¹⁰ Mr. Courter agreed, and further asserted that the Bankruptcy Court induced IDT Winstar into the acquisition by promising that no cure amounts would have to be paid.¹¹ Of course, no such statements were made by the Bankruptcy Court.

On April 17, 2002, IDT Winstar filed its Motion to Enforce Injunction Against Stopping Services to Debtors Before the Cutoff Date. By this motion, IDT Winstar sought to enforce its interpretation of the Sale Order, specifically, that despite rejection of the contracts with the ILECs, the ILECs would be compelled to continue to perform under those contracts.¹² The Bankruptcy Court entertained an emergency hearing on this motion on April 19, 2002, and denied the motion. In denying the motion, the Court disagreed with IDT Winstar's reading of the Sale Order and found that the Sale Order clearly contemplated that the Cutoff Date would conform to the 120 day transition period. The Court also found that if there is an injunction available, then IDT Winstar had an adequate remedy at law, and noted that IDT Winstar had

¹⁰ Winstar Communications Inc., Case No. 01-1430 (JJF), Transcript April 15, 2002 (attached as Exhibit D) p. 14. This statement directly contradicts Mr. Albalah's and Mr. Jonas' representations to the Court at the December 18, 2001 Sale Hearing. See n. 8.

¹¹ Mr. Courter stated: “. . . our ability not to [pay cure] was the inducement that this Court made that induced us to make the acquisition.” April 15, 2002 Transcript p. 40. Mr. Courter also represented that since December 19, 2001, IDT Winstar has expended the entire \$60,000,000 in operating funds committed to this project, and that IDT Winstar is “still bleeding about 16 to \$18,000,000 a day.” Id.

¹² The filing of this motion is wholly inconsistent with IDT Winstar's joinder in, and vigorous prosecution of, the Extension Motion. If IDT Winstar were correct in the interpretation of the Sale Order it advanced in this motion, then the Extension Motion would have been of no consequence to IDT Winstar. Surely, Mr. Jonas, Mr. Courter, Mr. Rochwarger and Mr. Finkelstein would not have taken two days out of their schedules to attend a hearing of no consequence.

already started litigation in other fora. IDT Winstar filed an appeal with the United States District Court for the District of Delaware from the Bankruptcy Court's order denying its motion, and without a hearing and without requiring a bond, the District Court issued an emergency order, preventing the ILECs from terminating service to IDT Winstar until the court could hold a hearing on IDT Winstar's emergency motion for relief pending appeal.

Following IDT Winstar's instructions, on April 18, 2002, the Trustee filed her Notice of Rejection of Certain Executory Contracts and Unexpired Leases (No. 1). Included in the notice were all interconnection agreements with the SBC Affiliates. The Notice of Rejection indicates it is an irrevocable rejection effective as of April 22, 2002. Any other agreements with the SBC Affiliates are deemed rejected as a matter of law because the agreements were not assumed within the time specified by the Bankruptcy Court.

B. Actions Outside the Bankruptcy Proceedings

The Petition sets forth what IDT Winstar asserts to be the numerous efforts that IDT Winstar made before the Commission and the various state commissions to obtain permission to acquire the licenses of the Debtors. Conspicuously absent from IDT Winstar's recitation is any act to obtain from any ILEC the circuits and facilities necessary to provide service to their customers. While the SBC Affiliates and IDT Winstar have negotiated new interconnection agreements in ten of the thirteen states served by the SBC Affiliates, IDT Winstar has not submitted to any SBC Affiliate even one access service request or local service request under the new interconnection agreements, nor has IDT Winstar obtained any circuit or facility under any SBC Affiliate tariff. Rather, consistent with the position taken in the Petition, on February 26, 2002, IDT Winstar delivered to the SBC Affiliates a letter advising them that IDT Winstar simply desired the SBC Affiliates "to transition to [IDT] Winstar the circuits identified in the

attached initial list.”¹³ IDT Winstar further advised the SBC Affiliates that the transfer of these circuits “requires only that Ameritech change the billing information associated with the listed circuits (a billing change only or “Record Order”) in order to undertake the transition of these circuits to [IDT] Winstar.”¹⁴ Because IDT Winstar’s request is inconsistent with the SBC

¹³ February 26, 2002 letter from Steven V. Murray, Senior Director, Winstar to Thomas Harvey Vice- President National and Regional Accounts Northeast, Ameritech and Brad Ostermann, Director – Access Sales, SBC Communications (without attachments) (attached as Exhibit E).

¹⁴ Notably, IDT Winstar’s attempt to have the circuits and facilities used by Debtors to serve their customers simply transferred to it without assumption and assignment was contained in a proposed form of order at the December 18, 2001 sale hearing in the Bankruptcy Court. As presented to the Court by IDT Winstar at the commencement of the sale hearing, proposed paragraph 23(f) of the sale order provided:

f. Service Providers that are required by this Sale Order to continue to provide common carrier communications services to the Debtors during the period from the Closing Date to the Cutoff Date and, subject to paragraph (d) above, who are requested by the Debtors or the Buyer to enter into comparable common carrier service agreements to permit the Buyer to provision the same services to the Customers, are directed to cooperate in a commercially reasonable manner with Buyer to establish such service agreements and arrangements. Where a requested facility or service is already in place and used by the Debtors to provide service to any Customers, Service Providers shall not apply any non-cost based charges, including, but not limited to, non-recurring charges and installation charges, unless the interconnecting carrier can demonstrate a bona-fide cost-basis for imposing such a charge on the Buyer. Moreover, where the facilities being ordered are already in place to serve the Customers, Service Providers shall not delay or otherwise impede the prompt establishment of service through such requirements as the testing of facilities and service installation periods that are otherwise applicable to newly installed facilities and circuits.

Proposed IDT Sale Order 12-18-01.doc (attached as Exhibit F). This proposed paragraph 23(f), which would have mandated the special treatment IDT Winstar now seeks, is not included in the Sale Order. Instead, the Sale Order is very clear that if and when IDT Winstar directed the Trustee to reject any interconnection agreement or other agreement with the Service Providers, IDT Winstar would receive telecommunications services “in accordance with, and to the extent required by, applicable law in a non-discriminatory manner” including providing IDT Winstar with “replacement circuits.”

Affiliates' interconnection agreements and tariffs, the SBC Affiliates declined to accede to IDT Winstar's request and thus provide special treatment to IDT Winstar.

The SBC Affiliates are willing to provide IDT Winstar with circuits and facilities if such circuits and facilities are properly ordered under either an applicable interconnection agreement or tariff. These tariffs and the interconnection agreements provide for standard ordering procedures and standard provisioning intervals. Each of the SBC Affiliate's tariffs has been approved by the appropriate federal or state commission, and each of the SBC Affiliate's new interconnection agreements with IDT Winstar will be considered once submitted to the appropriate state commission. There is no provision in any interconnection agreement or tariff that permits IDT Winstar to simply assert that it wants to be assigned specific circuits that belong to another party. As in the bankruptcy scenario, assignment of a circuit or facility is possible outside of bankruptcy, but it still requires payment of the outstanding debt related to that circuit.¹⁵ Such debt is not, as IDT Winstar asserts, "an unrelated party's debts;" such debt is of the predecessor-in-interest. Having bought the Debtors' assets for a song, IDT Winstar now

¹⁵ See, for example, the provisions from Southwestern Bell's Tariff FCC No. 73, Section 2.2.1 Assignment and Transfer of Facilities, which states in pertinent part as follows: "(A) The customer may not assign or transfer (e.g., mergers, acquisitions consolidations) the use of services provided under this tariff except, where there is not interruption of use or relocation of the services, such assignment or transfer may be made to (1) Another customer, whether an individual, partnership, association or corporation, provided the assignee or transferee assumes all outstanding indebtedness for such services, the unexpired portion of the minimum period and the termination liability application to such services, if any; . . . " The FCC Access Service Tariffs for Ameritech, Nevada Bell and Pacific Bell each contain substantially identical language in the respective portions of their tariffs entitled "Limitations" at Section 2.1.2; The Southern New England Telephone Company Access Service Tariff contains substantially identical language at Section 2.5.5 entitled "Assignment or Transfer of Service." The General Exchange and Local Exchange Tariffs of each of the SBC companies contain similar limitations on assignment or transfer of service.

wants the Commission to assist it in attempting to avoid the payment obligations attendant to the assumption of circuits.

III. ARGUMENT

In the Petition, IDT Winstar asserts that because the SBC Affiliates are not providing IDT Winstar special treatment, and because the SBC Affiliates insist on exercising their rights under the Bankruptcy Code, the SBC Affiliates are violating Sections 201, 202, 203 and 251 of the Communications Act. As recognized by IDT Winstar, these sections require that the SBC Affiliates “provide services under just and reasonable terms, on a non-discriminatory basis, and in accordance with the terms of the relevant tariffs.” Petition pp. 8-9. The SBC Affiliates are doing precisely that. The SBC Affiliates negotiated in good faith and entered into new interconnection agreements with IDT Winstar; the SBC Affiliates are willing to provide services to IDT Winstar pursuant to the terms of these new interconnection agreements and applicable tariffs; and the SBC Affiliates are treating IDT Winstar as it would treat any other CLEC looking to provision services. What the SBC Affiliates will not do is to prefer IDT Winstar over any other CLEC or permit IDT Winstar to get the benefit of an assignment of the SBC Affiliates’ contracts with the Debtors without the burden of the liabilities – which IDT Winstar itself acknowledged to the Bankruptcy Court it could not do.

IDT Winstar is not the first entity that has purchased assets from a CLEC in bankruptcy.¹⁶ But, IDT Winstar is the first entity in the SBC Affiliates’ experience that is: (i) seeking to purchase assets out of bankruptcy that has not sought to assume the interconnection and other agreements necessary to service the debtor’s customers, and (ii) proffering the novel claim that it

¹⁶ Because numerous CLECs are in bankruptcy, the issues presented in the Petition have far ranging policy implications and huge economic consequences.

can acquire the benefits of executory contracts (by obtaining existing circuits purchased pursuant to tariff or interconnection agreement to provide service to the debtor's customers) without assuming any liability for a cure. To SBC's knowledge, every other purchaser that has sought to serve the customers of a bankrupt carrier using circuits purchased by such carrier has acknowledged its liability for cure payments. For example in In re: Rhythms Netconnections, Inc., et al. Case Nos. 01-14283 through 01-14287 (BRL) (Bankr. S. D. New York); In re: Sure-Tel, Inc., Case No. 01-21372 –WV (Bankr. W.D. Ok.); and In re: Pointecom, Case No. Case No. 01-01561 (JJF) (Bankr. D. Del.), the purchasers agreed to pay a cure for circuits obtained pursuant to interconnection agreements with the SBC Affiliates. In each such instance, the SBC Affiliates could have insisted on strict implementation of their full rights under the Bankruptcy Code, but were willing to negotiate a cure with the purchaser.

This purchaser has chosen a different strategy, and claims that irrespective of its obligations under the Bankruptcy Code, the Communications Act permits it to retain the benefits of the Debtors' executory interconnection agreements and tariffs (i.e., the circuits debtors ordered to serve their customers) without any corresponding obligation to cure. The purchaser's tactics should be summarily rejected.

A. Exercising One's Statutory Rights Cannot be a Violation of the Communications Act

Courts and the Commission have long recognized that the Communications Act must be read in harmony with other federal statutes. Indeed, the Commission specifically has acknowledged that it "is obliged to reconcile its policies under the Communications Act with the policies of other federal laws and statutes, including the federal bankruptcy laws in particular." Application of Parsons, 10 F.C.C.R. 2718, 2720 (1995) (deferring to decision of bankruptcy court on post-petition transfer of a station and its assets "so that innocent creditors may receive

the full protection afforded by federal bankruptcy law.”), *aff’d*, 93 F.3d 986 (D.C.Cir. 1996) (per curiam); Morton v. Mancari, 417 U.S. 535, 551 (1974) ([w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective”); Nextwave Personal Communications, Inc. v. F.C.C., 254 F.3d 130, 149 (D.C. Cir. 2001) (under the Administrative Procedure Act, court is required to “invalidate agency action not only if it conflicts with an agency’s own statute, but also if it conflicts with another federal law.”), *cert. granted*, 122 S. Ct. 1202 (2002).¹⁷ Moreover, the D.C. Circuit has determined that the Commission’s public interest mandate under the Act includes protecting innocent creditors of bankrupt entities. See LaRose v. F.C.C., 494 F.2d 1145, 1148 (D.C. Cir. 1974) (recognizing the *Second Thursday* mandate and finding that the Commission abused its discretion in failing to include in its consideration of the public interest the protection of innocent creditors).

Granting the Petition will conflict with the Bankruptcy Code and the policies underlying it. Section 365 of the Bankruptcy Code unambiguously sets forth the requirements for assumption of contracts and assignments to a purchaser. Section 365(f)(2) provides that a trustee may assign an executory contract if “the trustee assumes such contract . . . in accordance with the provisions of this section” and provides adequate assurance of future performance by the assignee. 11 U.S.C. § 365(f)(2). Section 365(b), in turn, provides that if there has been a default

¹⁷ In Nextwave Personal Communication, the bankruptcy court stated that “[t]he FCC cannot, either by its regulations or its interpretation of its regulations, supervene either the Federal Communication Act or the Federal Bankruptcy Code. Where those regulations or the agency’s interpretation thereof conflict with . . . the Bankruptcy Code, the will of Congress in the statutes must prevail.” Nextwave Personal Communications, Inc., 244 B.R. 253, 283 (Bankr. S.D.N.Y. 2000). The subsequent history of this case is unclear. It appears that it may have been reversed, albeit on other grounds, by the Court of Appeals for the Second Circuit in In re: F.C.C., 217 F3d 125 (2d Cir. 2000).

under a contract, in order to assume the contract, the debtor must “cure” it. 11 U.S.C. § 365(b)(1). The policy behind this provision is that if the trustee is going to take the benefits of a contract by assumption of the contract, the non-debtor party to the contract is entitled to the full benefit of its economic bargain. Leon’s Casuals Co., Inc., 122 B.R. 768, 770 (Bankr. S. D. Ala. 1990); see S. Rep. No. 95-989, at 59 (1979), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5845; H.R. Rep. 95-595, at 348 (1979) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6304-05.

It is clear that IDT Winstar is attempting to get the benefits of the Debtors’ agreements with the SBC Affiliates by obtaining the circuits Debtors used to provide service to their customers without taking the corresponding burden, i.e. paying the cure. There is no provision of the Bankruptcy Code or any applicable non-bankruptcy law that would permit such a result, and IDT Winstar cites no such law. Rather, IDT Winstar wants to better its deal (which its chairman has trumpeted is second only to the purchase of Manhattan from Native Americans), by refusing to pay the cure amounts required by Section 365. The Commission cannot, consistent with its public interest obligation to protect innocent creditors, permit such a result.¹⁸

More fundamentally, there is no conflict between the Bankruptcy Code and the Communications Act on this point. Neither the Communications Act nor the Bankruptcy Code permits IDT Winstar to take an assignment of the Debtors’ contracts with the SBC Affiliates, or the benefits of such contracts (i.e. the circuits purchased pursuant to those contracts, which were the essence of those agreements), for free. While at the April 15, 2002 hearing on the Extension Motion, IDT Winstar’s counsel argued that the Telecom Law would permit his client to get the

¹⁸ IDT Winstar asserts that the SBC Affiliates would not be harmed by the requested relief because they are being prepaid for services post-December 19, 2001. First, see n 5, above. Second, this is not true and beside the point; the SBC Affiliates are being harmed because their statutory rights to a cure would be eviscerated.

services needed without assuming the interconnection agreements under the Bankruptcy Code, the Petition does not cite to any provision of the Telecommunications Act that permits an assignment of the Debtors' circuits the SBC Affiliates had provisioned to the Debtors.

Neither is there any conflict between the Bankruptcy Code and Section 214 of the Communications Act. The Bankruptcy Code does not prohibit the giving of a Section 214 notice. In fact, the Commission has "admonishe[d] all carriers that are situated similarly to NorthPoint [in bankruptcy] now, or that may be in the future, to fully comply with the letter and intent of the Commission's regulations implementing section 214. These regulations are designed to avoid unexpected service disruptions as much as possible, even when resulting from a carrier's insolvency, by ensuring that customers receive adequate notice of impending discontinuances of service so that they may arrange for alternative service."¹⁹ Had either the Debtors or IDT Winstar provided a Section 214 notice to the Debtors' customers, the possibility of interrupted service would not even exist.²⁰

¹⁹ Requirements for Carriers to Obtain Authority Before Discontinuing Service in Emergencies and NorthPoint Communications, Inc., Authority to Discontinue Service, 16 F.C.C.R. 10924 (2001). While the NorthPoint Application also sets forth certain goals for ensuring that customers are not affected by the liquidation of a carrier in bankruptcy, Northpoint involved the partial sale of assets (collocation arrangements) excluding the previously provisioned circuits or customers and an application under Section 214 for permanent discontinuance of service. In NorthPoint the Commission did not suggest that the ILECs had to subsidize the assignment of interconnection agreements to a purchaser of assets out of bankruptcy.

²⁰ Moreover, had the GSA not awarded two additional contracts to the Debtors post-petition, there would have been fewer customers subject to the possibility of interrupted service. See GSA Press Releases dated August 19, 2001 relating to the San Antonio, Texas MMA and November 19, 2001 relating to the Detroit MMA. Note that on November 21, 2001, Debtors filed their Motion of the Debtors for Orders Pursuant to 11 U.S.C. §§ 363(b) and 105(a) and Fed.R.Bankr.P. 2002, 6004, 6006 and 9014 (A)(i) Approving Bidding Procedures, Including Bid Protections, (ii) Approving the Form and Manner of Notice of (a) Bid Procedures Hearing (b) Sale Hearing (c) Cure Amount Notices and (d) Assumption Notices and (iii) Scheduling Sale Hearing, and (B) Authorizing and Approving (i) Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims and Encumbrances, and (ii) The Assumption and Assignment of Certain

B. Acting Consistently With One's Tariffs Cannot Be a Violation of the Communications Act

Alternatively, IDT Winstar complains that because the SBC Affiliates are not preferring IDT Winstar to other CLECs in the provisioning of services, that the SBC Affiliates are violating the Communications Act. Again, IDT Winstar cites no authority for this novel proposition. Under the filed rate doctrine, the SBC Affiliates must act in compliance with their tariffs and cannot provide preferential treatment to, and thus discriminate in favor of, IDT Winstar. See e.g. 47 U.S.C. § 203; V.T.C.A, Utilities Code, Section 52.053. The SBC Affiliates have not refused to provide services to IDT Winstar; they have only insisted that IDT Winstar correctly provision services under either their new interconnection agreements or the SBC Affiliates' filed tariffs, which were allowed to take effect. IDT Winstar had the option of stepping into the shoes of the Debtors. It chose not to. Now, it is bound by that choice, and must provision services like any other CLEC. This cannot possibly be a violation of the Communications Act.²¹

Executory Contracts and Unexpired Leases, in which they proposed that bids should be submitted by December 4, an auction conducted on December 5, the sale hearing on December 10 and closing by December 31, 2001.

²¹ IDT Winstar addresses at some length the fact that it appears that there may have been seamless transition of facilities in other acquisition scenarios. IDT Winstar does not discuss the details of those arrangements, and the SBC Affiliates are not privy to the agreements reached between the parties to those acquisitions. However, it is not difficult to posit that those transitions, if seamless, were the result of negotiations between the parties, and/or the assumption of the various interconnection and other agreements and payment of an agreed cure for any outstanding indebtedness.

IV. CONCLUSION

IDT Winstar has created an “emergency” situation and is asking the Commission to bail it out by invoking statutory buzz words such as “unjust,” “unreasonable,” “service disruptions,” “discrimination” and “competition.” The Commission must not be blinded by such words; they are a smoke screen. The real culprit here is IDT Winstar. The ability to resolve this “emergency” is in IDT Winstar’s hands. The Commission must not reward IDT Winstar for its underhanded tactics.

Insisting upon compliance with the United States Bankruptcy Code and the provisions of interconnection agreements and tariffs is not a violation of the Communications Act; to the contrary, as both the Courts and the Commission have recognized, it is part and parcel of the public interest requirements of the Act. The Commission should so find, and deny the Petition.

Respectfully submitted,

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